No. 18206

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TRENNIS K. LILE,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

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# BRIEF FOR PETITIONER

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ON PETITION FOR REVIEW
OF
SECURITIES AND EXCHANGE COMMISSION ORDER

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North Hollywood, California

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## JURISDICTIONAL STATEMENT

This is a petition for review filed pursuant to provisions of §25a of the Securities and Exchange Act of 1934 (15 U.S.C. 78-Y). The petitioner, Trennis K. Lile, an individual, was named as a cause of an order of revocation hereinafter discussed in proceedings which were instituted before the Securities and Exchange Commission. The proceedings were instituted pursuant to §§ 15 (b) and 15 A (1) (2) of the Securities and Exchange Act of 1934 by order of the Commission dated June 30, 1958, as amended, to determine whether to revoke the registration of J. Logan & Co. as a broker-dealer, whether to suspend or expel it from membership in the National Association of Securities Dealers, Inc., and whether the

petitioner Trennis K. Lile, among others, was a cause of any order of revocation, suspension, or expulsion, if entered. Hearings were held in Los Angeles during 1959 and 1960. The Transcript of the proceedings comprise nine volumes.

On April 28, 1961 a recommended decision was filed with the Securities and Exchange Commission by the Hearing Examiner James G. Ewell.

On July 9, 1962 the Commission issued its Findings and Opinion and on the basis of said Findings and Opinion issued order that the registration as a broker-dealer of J. Logan & Co., be revoked and that said J. Logan & Co. be expelled from membership in the National Association of Securities Dealers, Inc. and further ordering that the petitioner, Trennis K. Lile, among others, was a cause of the Commission's order. The order of the Commission was filed on July 9, 1962 but was not entered. Prior to entry of the order, to wit, on or about September 10, 1962 petitioner filed his petition for review before the United States Court of Appeals for the Ninth Circuit. This Court's jurisdiction accordingly rests upon 15 U.S.C. 78-Y.

## STATEMENT OF THE CASE

This is a petition for review brought by petitioner, Trennis K. Lile, who is named as a cause of an order of revocation of the registration as a broker and dealer in securities of J. Logan & Co. and of the expulsion from the National Association of Securities

Dealers, Inc. of said J. Logan & Co. and further holding that petitioner was a cause of said order of revocation and expulsion which order was made by the Securities & Exchange Commission on July 9, 1962.

The practical effect of the Commission order is to prevent any further employment of petitioner by any licensed broker-dealer registered with the National Association of Securities Dealers throughout the United States.

The order for proceedings, as amended, alleges in substance that between October 1, 1953 and January 1, 1958, J. Logan & Co. and its officers and employees, wilfully violated the anti-fraud provisions of §17(a) of the Securities Act of 1933 and §§ 10(b) and 15(c) (1) of the Exchange Act (Tr. Vol. IX, pp. 5948 to 5954). It was alleged that the registrant and its officers and employees obtained money and other property from customers by means of misrepresentations and omissions of material facts and by engaging in a course of dealings which operated as a fraud and deceit upon said customers. The order further alleged that J. Logan & Co. and the petitioner, who was a salesman, induced trading in the accounts of customers which was excessive in number and frequency and that by means of representations to said customers induced them to place full trust and confidence in registrant and the petitioner, among others, and further to believe that they were receiving impartial advice and that the registrant and petitioner, among others, would act in the best interest of such customers in connection with the purchase and sale of securities. The order further

alleges that contrary to the best interest of said customers and in violation of the trust and confidence imposed therein, petitioner and others induced such customers to engage in an excessive number of transactions for both purchase and sale, failed to disclose the adverse interest of J. Logan & Company in such transactions when acting as dealer or principal. The order further alleges that petitioner and others made conflicting and inconsistent recommendations to various customers to stimulate transactions for both purchases and sales without disclosing that the advice given to one or more customers was inconsistent with the advice given to others.

## A. The Facts of This Case As They Apply To Petitioner.

The record in this case consists of in excess of 5,000 pages of testimony. Witnesses called numbered approximately 50 and there were approximately 120 documentary exhibits admitted into evidence.

Hearings commenced on April 7, 1959 and petitioner was present during the testimony of one Olive T. Sands, one of his alleged customers (Tr. Vol. I, pp. 193-235). Petitioner was not represented by counsel at the time. He did, however, examine the witness Sands and a further witness, Paul Sands, her brother, who was not a customer (Tr. Vol. I, pp. 230-233; 247).

Petitioner was also present on April 8, 1959 when John T. Sinette, Jr., another witness, testified. He was not represented

by counsel but did question the witness briefly (Tr. Vol. I, pp. 365-368). Thereafter he did not appear nor was represented by counsel. Subsequently, to wit, on or about September 30, 1960, petitioner was notified that the hearings had been concluded and that the recommended decision of the Hearing Examiner was due on November 17, 1960. On October 4, 1960 petitioner wrote to the Securities and Exchange Commission in which he notified the Commission that he was not an attorney and was unfamiliar with Commission procedures. He further notified the Commission that J. H. Logan, President of J. H. Logan & Co. had instructed him that the hearings were only against the company and that individual salesmen such as himself would have a hearing at a later date. He further advised the Commission that his presence at the hearing was intended to be of help to Mr. Logan and he did not believe that the proceedings were intended to present charges against him as an individual (Tr. Vol. IX, pp. 6246-6248).

Petitioner immediately thereafter engaged an attorney at law, one Alexander Googoogian, of Los Angeles, California, who made a formal request to the Commission on behalf of petitioner to reopen the proceedings against petitioner for the purpose of receiving testimony in his defense or in the alternative that petitioner be granted the right to submit affidavits and evidence in support of his position which affidavits would set forth defensive matters as to the charges made against petitioner (Tr. Vol. IX, p. 6293). An answer on behalf of the Division of Trading was filed in opposition to petitioner's request to reopen the record on

November 3, 1960 (Tr. Vol. IX, p. 6297). On December 7, 1960, the Commission formally denied petitioner's request to reopen the record (Tr. Vol. IX, p. 6301).

The Hearing Examiner concluded that the evidence overwhelmingly established that J. Logan & Co., together with petitioner Lile and others, engaged in acts, practices and a course of business which would, and did, operate as a fraud and deceit upon their customers.

The Hearing Examiner determined that there was substantial evidence in the record showing that petitioner did the following:

1. Instigated a series of cross-trading transactions between two customers, namely, Reynolds and Hulbush.

2. Had engaged in excessive trading.

3. He effected several transactions without authorization for customers Sinette, Hauhart and Olive Sands.

4. He made a false statement to "customer" Paul Sands that J. Logan & Co. had a research budget of $800,000.00.

The examiner concluded that petitioner participated in the misrepresentations and "churning" activities of J. Logan & Co. and that thereby he wilfully violated the anti-fraud provisions.

The Commission sustained the findings of the Hearing Examiner and ruled that the record supported the findings as to petitioner.

The facts in the record as to these transactions are as follows:

1. Olive Sands: Olive Sands did not become a customer of J. Logan & Company and was involved in one sale of stock by

petitioner which was cancelled immediately upon her request. She at no time relied on the advice of petitioner but relied entirely on the advice of her brother Paul Sands who was not a customer of J. Logan & Company (Tr. Vol. I, pp. 194-234).

2. Paul Sands: Paul Sands was never a customer of J. Logan & Company or of petitioner. He had a discussion with petitioner with reference to the cancellation by his sister of the one transaction negotiated on her behalf by petitioner (Tr. Vol. I, pp. 241-247).

3. John T. Sinette, Jr. He was a customer of J. Logan & Company and of a salesman by the name of Wagner for a considerable period prior to any transaction with petitioner. When Wagner left J. Logan & Company his account was assigned to petitioner.

In a telephone conversation with petitioner Sinette advised petitioner that he had a number of securities which he wanted to sell and he further advised petitioner that he was uncertain about the condition of the market at that time (Tr. Vol. I, pp. 311-323). Petitioner recommended to him generally that he should invest in mutual funds. The witness stated that he agreed to let J. Logan & Company sell his listed securities and his over-the-counter securities because petitioner told him that no commissions would be charged. When his securities were sold per his instructions, he discovered that he had been charged a commission for two securities which were listed stock. Under the rules of the New York Stock Exchange commissions could not be waived. He complained of this to petitioner and through petitioner's efforts the

Commissions were absorbed by J. Logan & Company. He also questioned the fairness of the prices paid him on his over-the-counter stock. There was no evidence in the record that J. Logan & Company charged him any mark-up in excess of the customary 5% permitted by NASD. He stated that he had not been advised that J. Logan & Company was a principal in this transaction as respects his securities, all of which were, except as noted above, sold in the over-the-counter market. He did, however, receive confirmation tickets evidencing the disclosure of the fact that J. Logan & Co. had acted as principal (Tr. Vol. I, pp. 354-367).

4. Margaret Hulbush: Mrs. Hulbush was a real estate broker. Petitioner made several purchases and sales for her between December 26, 1956 and July 10, 1957. The Commission elicited testimony to the effect that on December 26, 1956 there was a purchase of certain stock and a sale of other stock. Then on July 10, 1957, there was another purchase of certain stock and a sale of other stock. There was no discussion between petitioner and Mrs. Hulbush as to what transaction, if any, he had negotiated with other customers respecting the same securities involved in these transactions (Tr. Vol. V, pp. 3143-3153).

5. Jean Reynolds: She testified that she had holdings of the value of approximately $57,000.00 when she first discussed her securities business with petitioner in 1956. For a period of a little over a year petitioner handled her account. During December, 1956 petitioner recommenced that she sell certain shares of stock and purchase with the proceeds therefrom other

shares of stock. Thereafter on July 7, 1957 petitioner recommended that she again sell certain stock and purchase other stock with the proceeds. Petitioner did not disclose to her his transactions with other customers of J. Logan & Company made at the same time with respect to the same securities (Tr. Vol. VI, pp. 3268-3329).

6. Hertha Hauhart: She testified that her dealings with the J. Logan & Company were through a salesman named Sarafian. Petitioner called her on one occasion on behalf of Sarafian with respect to a proposed purchase by her of a certain security. This security was ordered on her behalf by Sarafian in the belief that she had accepted the transaction. She later denied that she had approved the transaction and it was cancelled by J. Logan & Company at no cost to her (Tr. Vol. IV, pp. 1265-1349).

During the proceedings before the Commission petitioner appeared briefly, as hereinabove noted. He was not represented by counsel at any stage of the proceedings and was laboring under the belief that the proceedings concerned J. Logan & Company exclusively. He did not grasp the significance of the proceedings insofar as he was concerned until the hearings were concluded, at which time he engaged counsel and through counsel petitioned for an opportunity to submit additional evidence and to explain the evidence heretofore introduced against him. In his motion prepared by counsel, he requested an opportunity to testify in his own behalf. Counsel for the Commission opposed the petition to reopen and the Commission formally denied the petition on December 7, 1960 (Tr. Vol. IX, pp. 6246-6301).

## SPECIFICATION OF ERRORS RELIED ON

1. The findings and conclusion of the Securities and Exchange Commission that petitioner is a cause of the order of revocation of the registration as a broker and dealer in securities of J. Logan & Company, and of its expulsion from membership in the NASD is not supported by substantial evidence and is contrary to law.

2. The order of the Commission denying petitioner's leave to reopen the proceedings for the purpose of receiving testimony in his defense should be set aside in the interest of justice and petitioner afforded an opportunity to present his defense.

## QUESTIONS PRESENTED

1. Whether a salesman should be found the cause of an order of revocation and as a practical matter be barred from future activity as a security salesman merely because in isolated transactions he has recommended the sale of a security to one customer and the purchase of the same security to another customer.

2. Whether a salesman can be so barred from future activity as a security salesman merely because in connection with a particular account there are 96 transactions in the period of a year and a half.

3. Whether a salesman can be so barred from future activity as a security salesman merely because there were a few

isolated instances in which customers claimed that their orders were incorrectly executed and in each instance the wishes of the customers were promptly complied with at no financial loss to the customer.

4. Whether a salesman can be so barred from future activity as a security salesman merely because of the testimony of a non-customer accusing the salesman of having made a fantastically exaggerated statement of the research activities of his company in the securities field.

5. Whether a salesman can be so barred from future activity as a security salesman merely because it has been shown that there was serious misconduct on the part of the company he was associated with and some of its officers and salesmen without a further showing of his individual participation or knowledge of the wrongdoing of the others.

## ARGUMENT

### I

### THE FINDINGS AND CONCLUSION OF THE SECURITIES AND EXCHANGE COMMISSION NAMING PETITIONER A CAUSE OF THE ORDER OF REVOCATION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS CONTRARY TO LAW.

### A. Petitioner Did Not Commit A Fraudulent Act In His Recommendation Of The Sale Of A Security To Customer And The Purchase Of The Same Security To Any Other Customer.

The evidence in the proceedings before the Commission disclosed that petitioner on two occasions, namely, December, 1956 and July, 1957 took inconsistent positions in connection with certain securities wherein one customer sold securities and another customer purchased the same securities (Tr. Vol. VI, pp. 3283-3286; Vol. V pp. 3144-3155). As a result of these transactions the Hearing Officer concluded that petitioner wilfully violated the anti-fraud provisions by misrepresentations in giving inconsistent recommendations to the customers solely in order to stimulate transactions for both purchases and sales (Tr. Vol. IX, pp. 6364-6366).

It is a rule of law that one who asserts fraud has the burden of proving it by clear and convincing evidence.

U.S. v. Thompson (10th Circuit), 279 F. 2d 165, 167.

Fraud cannot be founded on vague, doubtful, uncertain and inconclusive evidence or upon mere suspicion or conjecture.

U.S. v. Hancock, 133 U.S. 193, 33 L.ed. 601;

Hoffman v. Overbey, 137 U.S. 465, 34 L.ed. 754.

As was said in 24 Am. Jur. Fraud & Deceit, at page 121:

> "No issue, whether it is one of fraud * * * * or of other fact, may be decided or determined upon evidence which is speculative or inconclusive."

The attorney for the Division of Trading conceded that the evidence he was offering during the proceedings as to violation of the anti-fraud provisions of the Exchange Act by petitioner and others was inconclusive, except for its cumulative effect. He said as to the inconsistent recommendations of buying and selling:

> "If this happened once or twice or ten times it probably would be meaningless. We are offering it for its cumulative effect." (Tr. Vol. VII, p. 4271).

As to petitioner there were only two instances proven and by his own standards, this evidence against petitioner is meaningless. There is no evidence in the record that petitioner in the two instances, did not act in the best interests of the particular customer involved. There was nothing in the record that showed an ulterior motive in the conduct of petitioner with respect to both the Reynolds and Hulbush transactions. Absent evidence showing

fraudulent design and purpose or a motive of profit on the part of petitioner regardless of his fiduciary obligation to these customers, the Commission and the Hearing Examiner had no reasonable basis for an inference of wrong-doing.

It is very easy for the Commission to argue that the record substantiates an abundance of wrong-doing on the part of J. Logan & Co. and at the same time make use of this testimony of divers activities to implicate petitioner and to ascribe to him evil motives. But this is not fair play as against petitioner. Nor can we say that it necessarily follows that because there was active misrepresentation of others in the company that petitioner's activities should necessarily be given the same inference of wrong-doing as ascribed to others.

As a matter of fact the S. E. C. has been cautioned in decisions of the courts not to take such a wholesale, unguarded and all encompassing criterion of wrong in its efforts to deal with so-called "boiler room" operations of security dealers. As recently as 1961, the Second Circuit Court of Appeals in Berko v. S. E. C. 297 F. 2d 116, remanded an order of the S. E. C. finding a salesman a cause of revocation of a broker-dealer registration because the Commission had acted without adequate basis in its finding as to the particular salesman. Petitioner in the instant case was not a director of the brokerage firm or a principal or an officer in authority. He was simply a salesman hired to do a job. His case had to be judged on its own merits and restraint was required on the part of the zealous representatives of the Commission to guard against unfair and

hurtful accusations without adequate reasons therefor. Berko v. S. E. C., supra, was a petition to review an order of the S. E. C. finding petitioner a cause of revocation of broker-dealer registration. The Court of Appeals held that the revocation order based on the ground that the petitioner, without adequate basis, predicted to customers that certain stock would rise in value, lacked sufficient clarity to enable the court to make a considered judgment without substituting its own findings. The case was thereupon remanded for further consideration by the Commission. Said the court at page 117:

> "We applaud the efforts of the Commission in seeking better means of dealing with 'boiler room' operations and agree fully with the thrust of the last quoted statement. This statement would appear to be sufficient to condemn a brokerage firm or those in control.
>
> "The present case, however, involves the liability of an employee of the firm who exercised no control over its operations and apparently did not engage in a continuous course of fraudulent conduct."

The Court of Appeals was faced with the same problem as in the Berko case in Kahn v. S. E. C., 2nd Circuit, 297 F. 2d 112, where it again remanded to the Commission for further hearings where the Commission found a salesman a cause of revocation of a broker-dealer license. Here, too, the Court of Appeals said that

the so-called wrong-doing of the salesman would have to be spelled out with clarity and particularity and could not be predicated on a course of practice adopted by and subscribed to by the brokerage firm hiring the salesman or those in control.

An examination of the record in the instant case will compel the conclusion that petitioner was found a cause without full and complete examination of the facts. Indeed, the Commission did not feel it necessary in the case of customer Reynolds and Hulbush, to go beyond the fact that one customer sold and one customer bought about the same time and the same stock and the fact that this was not disclosed to the individual customer.

There was no showing by the Commission that it is the practice of the Trade to discuss with one customer the activity of another. There was no showing that the advice was not given in the best interest of either or both customers.

Different customers have inconsistent investment objectives and inconsistent needs.

Fraud could readily have been proven had the Commission shown that petitioner had represented a specific fact to one customer and at the same time represented to another customer that the same fact was not true. But this test was not met.

A stock can be a good investment for one customer and a poor one for another.

Transactions are often motivated by cash needs, income tax objectives, need for balancing portfolios and desire to switch to specific securities, all of which are personal and strictly

confidential to the customer and which the customer does not wish to have publicized to third parties.

In sum, as respects petitioner's dealings with customers Reynolds and Hulbush it cannot be said that there is substantial evidence in the record rebutting the presumption that petitioner Lile used his judgment as to each transaction in consideration for the needs of each customer and that in his dealings with Reynolds and Hulbush he was motivated by an honest intention on his part to carry out the particular needs of the customer. A finding of fraud in his dealings with Reynolds and Hulbush is clearly an unwarranted inference on the part of the Commission.

### B. The Record Does Not Show That Petitioner Actively Engaged In A Practice of "Churning" Accounts Allegedly Practiced By J. Logan & Co.

The Hearing Examiner and the Commission both agreed from an examination of the record that petitioner was guilty of joining in an accepted practice by J. Logan & Co. of "churning" of accounts and of excessive trading.

Of all the customers whom petitioner serviced during the period he was a salesman of J. Logan & Co., he is held in the record to have excessively traded only the account of customer Reynolds.

On this issue of excessive trading the Commission offered the testimony of Thomas Kelly, an employee of the S. E. C. He

testified that he examined the security ledger of J. Logan & Co. for the period from 1953 to 1957 and that as a result of his findings he compiled a record which was introduced in evidence as Division's Exhibit 98 (Tr. Vol. VII, pp. 4263-4266.

Witness Kelly admitted he made only a spot check and testified as follows:

> "I went through the security ledger and as I saw them I listed some down and when I thought I had enough I stopped." (Tr. Vol. VII, p. 4263).

Under examination by the Hearing Examiner the following colloquy ensued:

> "Examiner Ewell: One other question. Your exhibit or your compilation is not related particularly to any specific period except that it is within the over all period.
>
> "The Witness: That is right, yes.
>
> "Examiner Ewell: -- covered by the Commission's order to proceed.
>
> "The Witness: Yes, sir.
>
> "Examiner Ewell: October 1, '53 to January 1, '58, I think it is.
>
> "The Witness: Yes, it is. The latest transaction in here is in '57.
>
> "Examiner Ewell: Let me ask you this. You skipped around and what you attempted to do was to

put down transactions which appeared to you to be worthy of compilation in this exhibit.

"The Witness: That is correct. I just took certain ledgers, and I just looked down through the ledger through the page and where I saw two trades on or about the same date, one a buy and one a sell, both were customers; then I jotted them down on here. I have the actual letters that I looked at in the security ledgers."

When the witness was asked as to whether or not he made any further investigations as to whether or not the firm was maintaining a position in the securities which he put down in the exhibit he answered that he did not. He merely looked down the page and when he saw a trade-in and trade-out between customers he paid no attention as to whether or not there was a position in the stock (Tr. Vol. VII, p. 4288).

A finding of fraud as against petitioner must be supported by substantial evidence in the record and cannot be based upon inferences of the activities of others.

C. The Evidence Presented By Witnesses Olive Sands, Paul Sands, John T. Sinette, Jr. And Hertha Hauhart Does Not Justify His Being Named A Cause In The Revocation Proceedings Against J. Logan & Co.

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As hereinabove noted the record in this case encompasses 8 volumes of testimony. Miss Reynolds and Miss Hulbush testified that petitioner actively handled their accounts and guided their investment activities over an extended period. The other witnesses against petitioner testified to at best only incidental contacts with petitioner.

Olive Sands never became a customer of petitioner and she stated for the record that her brother Paul Sands was her security advisor (Tr. Vol. I, pp. 195-199).

After several discussions over a period of a month, petitioner persuaded her to sell certain stock she held and to purchase other stock.

When she consulted with her brother and he advised her to refuse the stock allegedly purchased, she demanded and received an immediate cancellation of the order. She objected, however, to a $60.00 charge which petitioner informed her was a cashiering charge because he had to buy back the stock for her that had been sold (Tr. Vol. I, pp. 199-212, 232). The most that could be said of her testimony is that there had been a misunderstanding and it had been resolved entirely to her satisfaction without loss, pecuniary or otherwise, to her.

The witness, Paul Sands, her brother, never was a customer of petitioner and never intended to purchase or sell any stock through petitioner. He merely inquired of the transaction had with his sister. He was an obviously biased witness. It is on his unsubstantiated testimony that petitioner claimed an $800,000.00 research budget of J. Logan & Co. which the Commission sought fit to ascribe as a fraudulent misrepresentation by petitioner to a customer. The witness admitted on cross-examination that he had trouble with his hearing and was somewhat confused as to the statement allegedly made by petitioner Lile (Tr. Vol. I, pp. 241-249).

The witness John T. Sinette, Jr.'s testimony discloses that he had been a customer of J. Logan & Co. long before he had been contacted by petitioner, having had many dealings with a salesman named Wagner. The witness Sinette himself desired to sell certain securities held by him and, in fact, personally initiated a sales transaction made on his behalf by petitioner. The witness testified that he was not imposed upon by petitioner or anyone else, that he was well versed in the affairs of the market, that he subscribed to Barron's and the Wall Street Journal. His only complaint was the prices he paid for the stock which was sold for him. (Most of this stock was over-the-counter stock, except for two listed securities.) He did receive confirmations of his sales disclosing J. Logan & Co. as a principal. The commissions paid were reinbursed him to placate him (Tr. Vol. I, pp. 311-354).

The witness testified at page 367:

"I understood that there would be no charge for

the sale. Now, my knowledge was rather limited I must admit."

He further stated on page 369:

"* * * I did not feel that I could definitely prove I had been taken advantage of."

A broker-dealer cannot be held guilty of "churning" an account where the transactions are initiated by the customer.

Carr v. Warner, 137 Fed. Supp. 615.

The Commission does not deny that petitioner was a salesman and not a maker of policy in the company. There is no evidence that petitioner knew what other people were doing in the company. It was incumbent upon the Commission to show that petitioner's dealings with his customers resulted in excessive trading and so-called "churning" and the testimony by the witness Kelly did not fulfill this burden. Where one's motive or intent is at issue events of a similar nature must be by the party charged with the Commission of the particular act in order to be competent evidence. Certainly acts of other parties is not admissible without a showing of a conspiracy which was not pleaded or proved in this case.

20 Am. Jur. p. 278, Evidence, §302.

There is a complete absence of evidence to rebut the presumption of good faith and fair dealing on the part of petitioner in the trading activity he conducted for his customer Jean Reynolds.

The court in S. E. C. v. Capital Gains Research Bureau, Inc., (2d Circuit) 300 F. 2d 745, stated that each case must be judged

upon its particular facts after a full and fair hearing and not upon unwarranted inferences.

Justice Clark, Circuit Judge, in his concurring opinion for remand in both the Kahn and Berko cases, supra, points out at 297 F. 2d, page 115, that the Commission cannot solely rely on the so-called "shingle" theory of implied fair dealing (which theory is set out in Hughes v. S. E. C. (2d Circuit), 139 F. 2d 434, cert. den. 321 U. S. 786) when it condemns the "boiler room" activities of a securities company, but the Commission must go further and connect a salesman explicitly with such activities. The record in the instant case is replete with generalities and offers myriad instances of suggested wrongdoing by others with no connection whatsoever of petitioner directly with the alleged fraudulent practices.

In their appraisal of the testimony given by witness Hauhart against petitioner, the Commission and the Hearing Examiner both concluded that there had been fraudulent activity on the part of petitioner. The record shows that she was also the regular customer of another salesman named Sarafian who had been named as a cause in the order of revocation. Petitioner's alleged connection with her involved his calling her on behalf of Sarafian with reference to the purchase by her of certain stock. She agreed to the purchase and subsequently received a confirmation of same. When asked about the purchase which she felt had been pressured upon her she stated as follows:

"And what did you say to that?

"Well I think I just accepted it." (Tr. Vol. IV, p. 1300)

Under cross-examination the witness admitted that she had dealt in grain speculation for several years and admitted that where there had been previous misunderstanding she had cancelled an order at no cost to herself and was well able to cancel the order allegedly placed for her by petitioner (Tr. Vol. IV, p. 1323). The following is noteworthy:

"Q. Mrs. Hauhart, you cancelled the transaction, the second one that you had with the firm, did you not?

"A. Yes.

"Q. And you didn't ask for a cancellation on the other transactions, yet knowing that you could do so if you wanted to.

"A. I was taken too much by surprise. * * *"

The testimony of the foregoing witness, it is submitted, fails to meet the test of substantiality such as to justify the deprivation by petitioner of his good name and of his right to livelihood in the securities field, on the charge of making unauthorized sales, for this transaction was obviously ratified.

## CONCLUSION

Petitioner has been found guilty of serious charges of fraud on evidence which is speculative and unsubstantial. The penalty imposed upon petitioner is without question unwarranted by the evidence and should be set aside.

There was no proof in the proceedings showing fraudulent conduct participated in by petitioner. Absent such proof, there is nothing to indicate in this record that petitioner intended anything but maximum profits for his client and prospective client.

The findings and conclusions of the S. E. C. as to petitioner, it is respectfully urged, should be set aside; or, in the alternative, the proceedings should be remanded to the Commission to take further evidence and thereby to permit petitioner to present testimony in his defense.

Respectfully submitted,

FIZZOLIO & FIZZOLIO and
ALBERT VIERI

By /s/ James M. Fizzolio
JAMES M. FIZZOLIO

## CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals For The Ninth Circuit and that in my opinion this brief is in full compliance with those Rules.

/s/ James M. Fizzolio
JAMES M. FIZZOLIO